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Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

OCTOBER TERM, 1986

RENA O. HILL
STAFF SERGEANT, UNITED STATES AIR FORCE, PETITIONER,

v.

UNITED STATES OF AMERICA, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

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QUESTION PRESENTED

Whether the petitioner's conviction of the charge and specification should be set aside because the evidence is insufficient to prove guilt beyond a reasonable doubt as required by the Due Process Clause of the Fifth Amendment to the Constitution of the United States?

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Contents	ii
Table of Authorities	ii
Opinions Below	1
Jurisdiction	2
Constitutional Provision Involved	2
Uniform Code of Military Justice Provision Involved	2
Statement of the Case	2
Reasons for Granting the Writ	4
Conclusion	8
Appendix A	1a
Appendix B	2a

TABLE OF AUTHORITIES

United States Constitution:	
Fifth Amendment	2, 4, 6
Uniform Code of Military Justice:	
Article 112 (a)	2
United States Code:	
10 U.S.C. 912 (a)	2
28 U.S.C. 1259	2
United States Supreme Court Decisions:	
In re Winship, 397 U.S. 358 (1970)	4
Leary v. *United States*, 395 U.S. 6 (1969)	7
Morissette v. *United States*, 342 U.S. 684	4
Mullaney v. *Wilbur*, 421 U.S. 684 (1974)	5, 7
Patterson v. *New York*, 432 U.S. 197 (1977)	5, 6
Tot v. *United States*, 319 U.S. 463 (1943)	7
United States Court of Military Appeals Decisions:	
United States v. *Cuffee*, 10 M.J. 381 (C.M.A. 1981)	6

Table of Authorities—Continued:

United States v. *Ford*, 23 M.J. 331 (C.M.A. 1987) 8
United States v. *Harper*, 22 M.J. 157 (C.M.A. 1986) 8
United States v. *Murphy*, 23 M.J. 310 (C.M.A. 1987) 8

United States Air Force Court of Military Review Decision:

United States v. *Bassano*, 23 M.J. 661 (A.F.C.M.R. 1987) 8

United States Federal District Court Decision:

United States ex. rel. Crosby v. *Delaware*, 346 F. Supp. 213 (D.C. Del. 1972) 6

State Supreme Court Decision:

State v. *Flinchpaugh*, 659 P.2d 208 (Kansas 1983) 7, 8

Manual for Courts-Martial:

Paragraph 37 (b) (2) 6, 7

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RENA O. HILL
STAFF SERGEANT, UNITED STATES AIR FORCE, PETITIONER,

v.

UNITED STATES OF AMERICA, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

The petitioner, Rena O. Hill, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Military Appeals entered in this proceeding.

OPINIONS BELOW

The order of the United States Court of Military Appeals is reported at ___ M.J. ___ (C.M.A. 1987) (Appendix A). The *per curiam* opinion of the United States Air Force Court of Military Review, dated 25 October 1985, was unpublished (Appendix B).

JURISDICTION

The final order of the United States Court of Military Appeals was entered 8 April 1987. The jurisdiction of this Honorable Court is invoked under 28 U.S.C. § 1259.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment of the Constitution of the United States provides: "No person shall be . . . deprived of life, liberty, or property without due process of law . . ."

UNIFORM CODE OF MILITARY JUSTICE PROVISION INVOLVED

Article 112 (a), U.C.M.J., (10 U.S.C. § 912 (a)) provides, in pertinent part:

> (a) Any person subject to this chapter who wrongfully uses . . . any substance described in subsection (b) shall be punished as a court-martial may direct.
>
> (b) The substances referred to in subsection (a) are the following:
>
> > Opium, heroin, cocaine, lysergic acid diethylamide, methamphetamine, phencyclidine, barbituric acid, and **marijuana** and any compound or derivative of any such substance. (emphasis added).

STATEMENT OF THE CASE

Petitioner was tried by a special court-martial, military judge alone, on 18 and 19 May 1985 at England Air Force Base, Louisiana. Contrary to her pleas of not guilty, she was convicted of one specification of wrongfully using marijuana between 18 December 1984 and 18 January 1985, in violation of Article 112 (a), Uniform Code of Military Justice (10 U.S.C. § 912 (a)). The military judge sentenced her to be discharged from the United States Air Force with a bad conduct discharge, to forfeit $200 of

her pay per month for 4 months, and to be reduced in grade to Airman Basic (E-1). On 25 July 1985, the convening authority approved the findings and sentence.

The United States Air Force Court of Military Review affirmed the findings and sentence, *per curiam*, on 28 October 1985. Upon discretionary review under Article 67 (b) (3), U.C.M.J. (10 U.S.C. § 867 (b) (3)), the United States Court of Military Appeals affirmed 8 April 1987. The issue herein presented was raised before both lower courts.

The specification and charge were based upon urinalysis of a urine sample petitioner provided during a random unit inspection conducted 18 January 1985 at the England Air Force Base Clinic. Senior Airman Beverly Hagen Jones, a laboratory technician, observed Staff Sergeant Hill from the restroom stall door while she urinated into either a styrofoam or sterile cup. (R. 50, 52-64, 79). After Senior Airman Jones verified that the proper amount had been provided, she transferred the sample to a specimen bottle, initialled the bottle, and took it to the noncommissioned officer in charge, Technical Sergeant Richard Plumlee (R. 52). He also carefully compared each specimen with a sample filled with the correct quantity of red dye. (R. 73 and 81). Tamper resistant tape was not yet required to secure each specimen bottle, but each bottle top was securely fastened. (R. 82). The samples were shipped to the Brooks Air Force Base Drug Detection Laboratory in a sealed box. (R. 88).

Despite all these precautions, two of the specimens shipped with the petitioner's did not contain a sufficient quantity for testing. (R. 106). Those samples had to be destroyed. (R. 107). No reasonable explanation for the insufficient samples, other than human error, was advanced at trial. (*See*, R. 136). There was no evidence of leakage during shipment. (*See*, R. 157).

After radioimmunoassay (RIA) screening at the Brooks Laboratory, petitioner's specimen was shipped to CompuChem Laboratories in Research Triangle Park, North Carolina. Although that facility was certified by the Department of Defense in 1983, it had not been recertified since changing ownership. (R. 194).

At the CompuChem Laboratory, the specimen was tested by gas chromatography mass spectrometry. Doctor Naresh Jain, an expert witness for the prosecution, examined the prosecution exhibits reporting chain-of-custody and testing, and testified that petitioner's sample contained the marijuana metabolete, Delta 9 THC caroboxylic acid in a concentration of approximately 61 nanograms per milliliter. (R. 191). In his opinion, an individual with that level of marijuana in his or her system would have felt some effect after ingesting the marijuana.

There was no other evidence that petitioner knowingly used marijuana.

REASONS FOR GRANTING THE WRIT

The Due Process Clause of the Fifth Amendment to the United States Constitution protects an accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he or she is charged. *In re Winship*, 397 U.S. 358 (1970). Absent an express determination by Congress to the contrary, every criminal offense which subjects an accused to felony-strength punishment requires an element of *mens rea* or criminal state of mind. *Morissette* v. *United States*, 342 U.S. 246 (1952). Petitioner submits that the prosecution failed to prove that she **knowingly** used marijuana beyond a reasonable doubt, and she was held strictly liable under a *malum prohibitum* theory of law, in violation of her right to due process of law.

The prosecution fails to satisfy its burden of proof when it relies soley upon a presumption to establish the element of *mens rea*, or requires the accused to negative the existance of such an element. *Mullaney* v. *Wilbur*, 421 U.S. 684 (1974). In *Mullaney* v. *Wilbur* this Honorable Court rejected the government's argument that logic and the logistics of proving state of mind dictated that an accused should bear the burden of proving that element in a homicide case:

> It has been suggested . . . that because of the difficulties in negating an argument that the homicide was committed in the heat of passion, the burden of proving this fact should rest upon the defendant. No doubt this is often a heavy burden for the prosecution to satisfy. The same may be said of the requirement of proof beyond a reasonable doubt of many controverted facts in a criminal trial. **But this is the traditional burden which our criminal justice deems essential . . . Although intent is typically considered a fact peculiarly within the knowledge of the defendant, this does not . . . justify shifting the burden to him.**

Id., at 701-702 (emphasis added).

Three years later, permissibly shifting the burden of proof as to an affirmative defense was distinguished in *Patterson* v. *New York*, 432 U.S. 197 (1977). In that case, the jury was instructed that an accused charged with murder "had the burden of proving his affirmative defense [of extreme emotional disturbance] by a preponderance of the evidence." *Id.* Had this defense been established, it would have reduced the offense from murder to manslaughter. Unlike the situation in *Mullaney, supra*, the statute in question ". . . included all the facts which the state was required to prove beyond a reasonable doubt if a person is to be convicted of murder. No further facts [were] either presumed or inferred in order to constitute

the crime." *Id.*, at 205-206. Additionally, the affirmative defense of extreme emotional distress did not serve to negative any of the facts the state was required to prove in order to convict the accused. Instead, the "true" affirmative defense scrutinized in *Patterson* constituted a separate issue. *Id.* at 206-207.

The Court refused to impose the burden of disproving a "true" affirmative defense on the prosecution. Just as clearly, it refused to shift the burden of disproving any element of the offense to the defendant:

> We thus decline to adopt as a constitutional imperative, operative countrywide, that a State must disprove beyond a reasonable doubt any and all affirmative defenses related to the culpability of an accused . . . We, therefore, will not disturb the balance struck in previous cases holding that the Due Process Clause requires the prosecution to prove beyond a reasonable doubt all the elements included in the definition of the offense of which the defendant is charged. *Id.*

The Due Process Clause, does not, therefore, prevent the States from creating affirmative defenses based upon justifications wholly independent of the essential facts or elements constituting the crime, and in so doing, placing the burden of producing evidence supporting that defense upon the accused. For facts to be properly classified as a "true" affirmative defense, however, they must operate as an excuse or justification for an accused, who in effect admits his guilt, but pleads nonenforceability on other grounds. *United States ex. rel. Crosby* v. *Delaware*, 346 F.Supp. 213, 216 (D.C. Del. 1972); *see also*, *United States* v. *Cuffee*, 10 M.J. 381 (C.M.A. 1981) (accused may be forced to bear burden of production as to affirmative defenses created by statutory exceptions to criminal

codes). The state may only create an affirmative defense upon a rational basis. *Crosby* v. *Delaware*, *supra*, 216.

Applying these principles to the present *Manual for Courts-Martial* (M.C.M., 1984.), it becomes clear that it offers no rational basis, nor does it even address the matter of eliminating *mens rea* as an element and making the lack of knowledge some sort of quasi-affirmative defense to the crime of using marijuana. Paragraph 37 (b) (2), M.C.M. 1984, establishes "wrongfulness" as an essential element of the offense. It goes on to specify three "exceptions" when use of contraband is not wrongful: (A) an act pursuant to legitimate law enforcement activities; (B) an act pursuant to medical authorization; and (C) without knowledge of the contraband nature of the substance. A critical distinction between these exceptions, is that while the first two set out true affirmative defenses, the third exception cannot be so characterized. If there is an elemental requirement of *scienter* or *mens rea* within wrongful use, mere statement in the negative ("[an act] without knowledge of the contraband nature of the substance") cannot magically convert that element into an affirmative defense. The prosecution cannot be properly absolved of its burden to prove that element beyond a reasonable doubt.

In the case, *sub judice*, the prosecution relied upon an inference that the presence of marijuana in the form of the THC metabolite in the petitioner's system established that she knowingly used the substance. In examining the validity of such an inference, the rational connection between the evidence presented and the facts inferred is a critical consideration. *See*, *Mullaney* v. *Wilbur*, *supra*,; *Tot* v. *United States*, 319 U.S. 463 (1943); *Leary* v. *United States*, 395 U.S. 6 (1969). Although certainly distinguishable, the Kansas Supreme Court recently examined a similar inference in establishing wrongful possession of drugs.

> [Although d]iscovery of a drug in a person's blood is circumstantial evidence tending to prove prior possession of drugs . . . it is not sufficient evidence to establish guilt beyond a reasonable doubt. The absence of proof to evince knowledgeable possession is the key. The drug might have been injected involuntarily or introduced by artifice into the defendant's system.

State v. *Flinchpaugh*, 659 P.2d 208 (Kansas 1983).

In short, mere presence of contraband in a person's system cannot sufficiently establish knowing use, or, by definition, wrongfulness beyond a reasonable doubt. *Contra*, *United States* v. *Harper*, 22 M.J. 157 (C.M.A. 1986); *United States* v. *Ford*, 23 M.J. 331 (C.M.A. 1987); *United States* v. *Murphy*, 23 M.J. 310 (C.M.A. 1987); *United States* v. *Bassano*, 23 M.J. 661 (A.F.C.M.R. 1987).

In this case, the prosecution failed to present any evidence that petitioner **knowingly** ingested marijuana, permitting the prosecution to rely upon even a "permissive" inference to establish an essential *mens rea* element is nothing more than impermissibly shifting the burden of proof to the accused by presuming the existance of that element. The constitutional standard of proof beyond a reasonable doubt as to each and every element of the charged offense was not met.

It is important to realize that granting petitioner's petition and the relief sought in no way diminishes the government's ability to combat drug abuse in the military services through urinalysis testing. Nothing would preclude the government from pursuing its many administrative remedies, including discharge. What petitioner protests is the unique military practice of relying exclusively upon urinalysis test results to impose criminal sanctions against an accused.

CONCLUSION

Petitioner submits that her petition for writ of certiorari should be granted in the interest of the fair

administration of military justice and requests that the finding of guilt to the charge and specification and the sentence be set aside and the charge and specification dismissed.

Respectfully submitted.

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Major, OTJAG
United States Air Force

APPENDIX A

UNITED STATES COURT OF MILITARY APPEALS

USCMA Dkt. No. 54130/AF
CMR Dkt. No. S26813

UNITED STATES, APPELLEE,
v.
RENA O. HILL (262-33-3242), APPELLANT.

ORDER

On consideration of the granted issue (22 M.J. 352) in light of *United States v. Ford*, 23 M.J. 331 (C.M.A. 1987) and *United States v. Murphy*, 23 M.J. 310 (C.M.A. 1987), it is, by the Court, this 8th day of April 1987,

ORDERED

That the decision of the United States Air Force Court of Military Review is affirmed.

For the Court,

/s/ John A. Cutts, III
Deputy Clerk of the Court

cc: The Judge Advocate General of the Air Force
Appellate Defense Counsel (BAKER)
Appellate Government Counsel (BARTON)

UNITED STATES AIR FORCE COURT OF MILITARY REVIEW

UNITED STATES
v.
Staff Sergeant RENA O. HILL, FR 262-33-3242
United States Air Force
ACM S26813

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25 OCT 1985

Sentence adjudged 29 May 1985 by SPCM convened at England Air Force Base, Louisiana. Military Judge: David M. Lewis (sitting alone).

Approved sentence: Bad conduct discharge, forfeiture of two hundred dollars ($200.00) per month for four (4) months and reduction to airman basic.

Appellate Counsel for the Accused: Colonel Leo L. Sergi, Major Conrad C. Baldwin, Jr., and Major Francis T. Lacey, USAFR. Appellate Counsel for the United States: Colonel Kenneth R. Rengert and Major David F. Barton.

Before

HODGSON, FORAY and MICHALSKI
Appellate Military Judges

DECISION

PER CURIAM:

We have examined the record of trial, the assignment of errors and the government's reply thereto and have concluded that the findings and sentence are correct in law and fact and that no error materialy prejudicial to the substantial rights of the accused was committed. *Murray v. Haldeman*, 16 M.J. 74

(C.M.A. 1984); *United States v. Hudson*, 20 M.J. 607 (A.F.C.M.R. 1985); *United States v. Frost*, 19 M.J. 509 (A.F.C.M.R. 19849. Accordingly, the findings of guilty and sentence are

AFFIRMED.

APPENDIX B

OFFICIAL

ELVA J. SMITH
Documents Examiner
Court of Military Review

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